Oral Argument Not Yet Scheduled

Case Nos. 15-1190, 15-1282

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

BRUSCO TUG & BARGE, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,

Intervenor.

On Petition for Review and Cross-Application for
Enforcement of a Decision and Order of the
National Labor Relations Board in Case No. 19-CA-096559

REPLY BRIEF OF BRUSCO TUG & BARGE, INC.

Thomas M. Triplett
Michael T. Garone
Schwabe, Williamson & Wyatt
1211 S.W. 5th Avenue, Suite 1900
Portland, Oregon 97204
Telephone: (503) 222-9981
Facsimile: (503) 796-2900
Email: ttriplett@schwabe.com
mgarone@schwabe.com

Attorneys for Petitioner Brusco Tug & Barge, Inc.

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GLOSSARY OF ABBREVIATIONS & ACRONYMS

Abbreviation/Acronym	Definition
Act	National Labor Relations Act
Board or NLRB	National Labor Relations Board
Brusco or the Company	Petitioner Brusco Tug & Barge, Inc.
Brusco's Opening Brief	Principal Brief of Petitioner/Cross-Respondent Brusco Tug & Barge, Inc.
International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978	STCW
NLRB Brief	Brief for National Labor Relations Board
Section 2(11)	29 U.S.C. § 152(11)
Section 8(a)(5)	29 U.S.C. § 158(a)(5)
Union	International Organization of Masters, Mates & Pilots, ILA, AFL-CIO
United States Coast Guard	USCG

I. INTRODUCTION

Petitioner/Cross-Respondent on Review Brusco Tug & Barge, Inc. ("Brusco") hereby files this brief in reply to the briefs filed by Respondent/Cross-Petitioner National Labor Relations Board ("NLRB" or "the Board") and Intervenor Organization of Masters, Mates & Pilots, ILA, AFL-CIO ("the Union").

II. SUMMARY OF ARGUMENT

Under well-established Supreme Court precedent, Brusco is entitled to obtain judicial review of the Board's September 22, 2000 certification through a petition for review of a final Board order finding that Brusco unlawfully refused to bargain under Section 8(a)(5) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(5). Brusco's primary argument in this review proceeding is that the Board erred in concluding that Brusco violated Section 8(a)(5) because the Board's 16-year old certification improperly included statutory supervisors, Brusco's mates, within the collective bargaining unit.

The Board's decision in this regard is contrary to a line of long-standing Board precedents holding that mates with substantially similar job duties and authority as Brusco's mates are statutory supervisors. While the Board has purported to distinguish its prior cases, it has not effectively done so and, in reality, the Board, by way of a two-to-one vote of a three-member panel, has *sub silentio*

overruled these cases. Thus, the Board's argument that its decision is entitled to substantial deference by this Court is incorrect.

Under the facts presented at the two administrative hearings held in this case (in 1999 and 2001) and, under the Board precedents referred to above, Brusco's mates are statutory supervisors because, while on watch, they act as the captain's surrogate and exercise independent judgment in the performance of several tasks identified in § 2(11) of Act, 29 U.S.C. § 152(11), including assignment and responsible direction of crewmembers. The Board's decision to the contrary in this case is unsupported by substantial evidence, misapplies established law, and is arbitrary. For example, despite admitting in its brief that Brusco's mates assign crewmembers to particulars locations on the vessel (and particular tasks) and make independent decisions resulting in crewmembers' receipt of overtime, the Board fails to recognize that such assignment authority creates supervisory status under the Board's decision in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006).

However, even if this Court were to conclude that substantial evidence presented at the 1999 and 2001 hearings supports the Board's conclusion regarding the supervisory status of mates when those hearings were held, the Court should still deny enforcement of the Board's order. The Board's delays in resolving the supervisory issues presented by this case have been astounding, including, among others, a four-year delay between 2002 and 2006 and a second six-year delay

between 2006 and 2012. Over the 16 years of Board process in this case, Coast Guard requirements regarding the status and duties of mates have gradually changed. These requirements place greater emphasis in the licensure of mates on leadership and direction of their crews. As a result, Brusco also places greater emphasis on these skills and duties. In addition, over the vast amount of time that this case has been pending, the line between captains, who are excluded from the bargaining unit as statutory supervisors, and the mates have become increasingly blurred, because the vast majority of Brusco's mates have the same Coast Guard licenses as Brusco's captains and are responsible for the performance of crewmembers under their command to the same extent as Brusco's captains.

Rather than taking into account these changes in the Coast Guard's regulatory framework and the changes in Brusco's practices which they have wrought, the Board has refused to even consider this evidence, instead relying on an overly-technical interpretation of its rule regarding the provision of new evidence in representation proceedings as well as its rule against relitigation of representation issues in ensuing unfair labor practice proceedings. The Board's denial of Brusco's proffer of evidence of changed and "special circumstances" constitutes an abuse of discretion under the facts and circumstances of this case.

III. ARGUMENT

A. Under the Circumstances Presented, the Board's Decision Is Not Entitled to Deference.

Like other administrative agencies, the Board is entitled under certain circumstances to judicial deference when it interprets an ambiguous provision of a statute that it administers. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984)). Under *Chevron*, the court (1) reviews the statute *de novo* to determine whether the statute is ambiguous and (2) if it is ambiguous, the court decides whether the agency interpretation is reasonable or "arbitrary and capricious." *Health Alliance Hosps., Inc. v. Burwell*, 130 F. Supp. 3d 277, 288 (D.D.C. 2015) (citing *Chevron*, 467 U.S. at 842-43).

As this Court has recognized on many occasions, an agency decision is unreasonable and/or arbitrary when the agency departs from its prior precedents without providing a reasoned justification for doing so. *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012). *See also Local 777, Democratic Union Organizing Committee, Seafarers Int'l Union of N.A. v. NLRB*, 603 F.2d 862, 871-72 (D.C. Cir. 1978) (although a determination of employee status under the Act may be factually dependent, where "the facts are substantially the same, the Agency's prior application of the statute has not been shown to be wrong and there has not been any change in the governing statute, the result should be the

same" and the court will give little deference to the Board's decision to "treat similar situations dissimilarly.").

Recognizing this well-established principle, this Court initially refused to enforce the Board's decision in this case that the mates were not statutory supervisors because the Board's finding conflicted with two prior cases in which the Board held that mates were supervisors, *Local 28, International Organization of Masters, Mates & Pilots*, 136 NLRB 1175 (1962), *enforced*, 321 F.2d 376 (D.C. Cir. 1963) ("*Local 28*"), and *Bernhardt Bros. Tugboat Serv., Inc.*, 142 NLRB 851, *enforced*, 328 F.2d 757 (7th Cir. 1963). *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 277-78 (D.C. Cir. 2001). (App-330.) Instead, the Court remanded to the Board "to explain why its decision in this case is not inconsistent with *Local 28* and *Bernhardt Brothers*, or, alternatively, to justify its apparent departures." *Id*. at 278, App-334.

While the Board purported to follow this Court's direction, it has failed to effectively explain why its prior decisions, decided on substantially similar facts, are no longer controlling. *See* Principal Brief of Petitioner/Cross-Respondent Brusco Tug & Barge, Inc. (Brusco's Opening Brief), pp. 48-52 (detailing reasons why Board's attempt to justify its departure from the prior precedents was unavailing). While the Board attempts in its brief to find factual dissimilarities between this case and its prior cases, those differences are more illusory that real.

See Brief for National Labor Relations Board ("NLRB Brief"), pp. 49-50. Thus, in *Local 28*, the Board's description of the duties and authority of the mate (in that case, referred to as the pilot), bears a striking resemblance to the facts presented here:

> When the Ingram master is relieved by the pilot at the conclusion of his watch he generally retires to his quarters. He may leave instructions for the pilot's information such as to pick up or drop barges from the tow at various locations. He does not, however, leave detailed instructions as to how these or any other operations pertaining to the navigation of the boat and tow are to be performed. Because of the recognized experience of and confidence in the pilots there is no need for such instructions from the master. Having assumed his watch, the pilot exercises the same responsibility as the master for the navigation and safe conduct of the boat, tow, and personnel.

Local 28, 136 NLRB at 1194 (emphasis added).

Due to its failure to adequately explain its departure from its prior precedents, the Board, in essence, has overruled its prior precedents *sub silentio*. Doing so by a two-to-one panel vote, the Board has acted in opposition to its well-established practice of not overruling Board precedents with less than a full complement of Board members. *See Chicago Truck Drivers Local 101 (Bake-Line Products)*, 329 NLRB 247, 254 (1999) ("it is not the Board's usual practice to overrule prior cases by the votes of two of a three-member panel").

The Board's two-to-one decision to repudiate its prior precedents regarding the supervisory status of mates is unsupported by a rational or well-articulated

reason and hence the Court should afford the Board's decision little or no deference.

B. The Board's Conclusion that the Mates Do Not Use Independent Judgment to Assign Work Is Unsupported by Substantial Evidence.

The Board concedes, as it must, that an individual "assigns" work within the meaning of Section 2(11) of the Act, 29 U.S.C. § 152(11), when the individual designates an employee to a specific place or location, or to work at a specific time, shift or overtime period. *See* NLRB Brief, p. 31 (describing test for "assignment" under *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) ("*Oakwood*"). Having correctly described the test, the Board proceeds to overlook or minimize the many ways in which Brusco's mates meet the test's requirements.

For example, the Board concedes in its brief that, when making up a tow or docking the vessel, the mate "tells the mate where to stand, where to place the lines, which lines to release, and which tools to bring." (NLRB Brief, pp. 7-8 (emphasis added).) The Board further concedes that, when bad weather conditions are present crossing the Columbia River bar, "the mate may post the deckhand to the bow of the boat to keep watch." (NLRB Brief, p. 11.)[2] When changing the length of a towline, the Board concedes that the mate directs the deckhand in

[2] This identical assignment was held by the Board in *Local 28* to support supervisory status of mates. *Local 28*, 136 NLRB at 1194.

various ways, including to the area of the winch to start the motor, to run or redirect the "fair lead," which leads the line, or to lubricate the line. (NLRB Brief, pp. 9-10.) The Board thus admits that the mate assigns the deckhands to particular places on the vessel in order to meet the exigencies of the conditions or circumstances encountered while the mate is on watch and acting as the captain's surrogate.

Similarly, the Board concedes that the mate assigns employees to work at particular times and/or for overtime periods. Thus, the Board references several situations in which the mate must make the decision whether to wake the engineer, the captain, or the crew. *See* NLRB Brief, p. 10 (mates make decisions as to whether to wake the captain if circumstances necessitate returning back to port or changing course); p. 11 (mates decide whether circumstances constitute an emergency requiring the mate to wake all crewmembers); p. 12 (at least some mates are given "a free hand" to determine when safety drills are conducted); pp. 12-13; 38 (mates decide whether to wake the engineer if something appears to be wrong with the engine or suspicious). Each of these decisions by the mates results in overtime for those members of the crew who are called from "off watch." (App-29-30, 60.)[3]

[3] No one can reasonably dispute that the assessment of an emergency need for additional personnel with the resulting expenditure of additional company resources is an attribute of supervisory status. In addition, federal maritime law

However, despite these admitted facts, the Board adheres to the unfounded notion that the requirements of *Oakwood* have not been met because the mates are simply engaged in "ad hoc instruction, not assignment." (NLRB Brief, p. 33.) This conclusion is not based on substantial evidence and is, in fact, directly contrary to *Oakwood*, in which the Board expressly found that the "discretion to determine when an emergency exists" constitutes support for supervisory status. *Oakwood*, 348 NLRB at 693-94.

Here, the mates make a myriad of independent decisions when they are on watch to assign crewmembers to specific locations, tasks and time periods. (App-121-122, 160, 175-177, 209-210, 234-238, 244-247, 250-251.) When circumstances dictate, the mates make independent decisions to require off-watch employees to report to duty or for safety drills, thereby increasing their pay. For example, it is solely up to the mate to determine if something looks suspicious or troublesome on his watch so as to necessitate waking the engineer. (App-110-111, 165-167, 210-211.) This is surely the type of supervisory activity that the Board's *Oakwood* decision was meant to encompass and is not simply *ad hoc* instruction for an employee to perform a discrete task.

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permits a licensed individual at sea to work more than 12 hours per day only in case of "an emergency when life or property are endangered." 46 U.S.C. § 8104(b). An individual in charge, such as a mate, can be fined $10,000 for violating this provision, underscoring the careful attention that must be given to the determination that an emergency exists. 46 U.S.C. § 8104(i).

The Board's further conclusion that the mates' assignment decisions are not the result of independent judgment is also not based on substantial evidence. For example, the Board claims that there is insufficient evidence that the mate exercises discretion in making the decision to wake up crewmembers and create an obligation for Brusco to pay overtime. (NLRB Brief, pp. 38-39.) However, the record is uncontradicted that such independent judgment is, in fact, exercised. *See, e.g.*, App-110-111 (based on his experience and knowledge, the mate makes the decision whether a particular situation, including weather conditions and engine issues, warrants waking the captain, engineer, or other crewmembers). While the mate is on watch, he is the captain's surrogate and makes all of the same discretionary decisions regarding the operation of the vessel and the direction of the crew that the captain makes while the captain is on watch.[4]

[4] The Union quarrels with the assertion that the mate is the captain's surrogate while the mate is on watch, engaging in a tortured interpretation of Brusco's Responsible Carrier Operation Plan. (Brief of Intervenor International Association of Masters, Mates & Pilots, ILA, AFL-CIO, pp. 10-12.) The Board appears to disagree with the Union's interpretation, stating only that the language in the plan relied upon by Brusco to support its assertion that the mate is the master's surrogate is "ambiguous." (NLRB Brief, p. 46, m. 13.) Brusco stands by its interpretation of the Responsible Carrier Operation Plan's statement that, "[i]n [the Captain's absence, his Relief is Master." (Supp-App-53.) Brusco's interpretation that this language was not intended to apply only when the captain is incapacitated is supported by the uncontradicted testimony. *See* App-69, 78 (testimony from both a captain and a mate that the mate assumes all of the captain's responsibilities when the captain is on watch and that the mate acts as the master and is in complete control of the vessel under such circumstances).

C. Brusco Should Be Able to Present Evidence of the Changing Role of Mates Over the Last Several Years.

In light of the unprecedented delay of 15 or so years caused by the Board in resolving the issue of the supervisory status of the mates, Brusco should have been given the opportunity to present evidence of changed and/or special circumstances regarding the current status and role of its mates. Brusco sought this opportunity in one of two ways, either by way of a reopening of the representation case or through its defense of the refusal-to-bargain complaint in the unfair labor practice proceeding. In contending that it did not abuse its discretion by denying either avenue and granting summary judgment in favor of the General Counsel in the unfair labor practice case without affording Brusco any opportunity to present its evidence, the Board makes no effort to demonstrate that the evidence proffered by Brusco regarding the status and role of its mates is irrelevant. (Board Brief, pp. 53-62.) Instead, the Board relies solely upon the notion that Brusco's offer of additional evidence and reliance on special circumstances was either untimely or procedurally improper. (Board Brief, pp. 55, 57.)

In making these contentions, the Board either ignores or misapprehends several important facts. First, the Board ignores the fact that, when Brusco first presented in March 2013 additional evidence relevant to the status and role of the mates, the representation case was still ongoing, as it had been since 1999, and there had been no final Board order upholding the Union's certification as the

exclusive bargaining representative. *See Brusco Tug & Barge, Inc.*, 362 NLRB No. 28, 2015 NLRB LEXIS 178, *13 (March 18, 2015) (in dissent, Board Member Johnson noted that, when Brusco offered its additional evidence, "the representation case was still pending"). (App-414).

Although the Board majority claims that Brusco's proffer was untimely because Section 102.48(d)(2) of the Board's Rules, 29 C.F.R. § 102.48 (d)(2), states that a motion for leave to adduce additional evidence in a representation case "shall be filed promptly on discovery of such evidence," the Board then took an additional two years after Brusco's proffer, until March 18, 2015, to finally decide the issue of the mates' supervisory status. Thus, the Board's claim of untimeliness "rings exceedingly hollow" and its refusal to permit additional evidence relevant to supervisory status appears arbitrary and capricious.

Second, the Board overlooks the order to show cause, which is contained in its March 18, 2015 decision. *Id*. at *7, App-413. In that order, the Board asked Brusco to show cause why the Board should not grant summary judgment to the General Counsel on the refusal-to-bargain complaint. In connection with that order, the Board stated that it is "possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention." *Id*. at *6-*7, App-413. Having invited the parties to submit additional evidence as part of its order to show cause, an invitation which Brusco accepted,

the Board proceeded in its grant of summary judgment dated June 15, 2015 to refuse to consider such evidence, based on the purported application of its rule against relitigating representation issues in an ensuing failure-to-bargain case. *Brusco Tug & Barge, Inc.*, 362 NLRB No. 115, 2015 NLRB LEXIS 453, *9 (June 15, 2015). (App-447-48.) Such a decision, to close a door that the Board opened, also smacks of arbitrary and capricious conduct.

Third, the Board's application of its no-relitigation rule under the circumstances presented was also arbitrary and capricious. In response to the Board's March 18, 2015 order to show cause, Brusco submitted additional evidence of changed or special circumstances in addition to the evidence Brusco had previously submitted in 2013. Importantly, Brusco submitted evidence that the Coast Guard's licensing requirements for deckhands to become mates had become increasingly intensive over the last few years.[5] As part of these increasing

[5] The U.S. is signatory to the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978 ("STCW"). On June 25, 2010, the International Maritime Organization adopted amendments to the STCW requiring the United States Coast Guard ("USCG") to overhaul U.S. mariner licensing and training requirements, including those affecting masters and mates on towing vessels. *See* 76 Fed. Reg. 45908, 45910 (Aug. 1, 2011). The USCG initiated implementation of the amended STCW by proposed rulemaking issued August 1, 2011, 76 Fed. Reg. 45908, with final rules issued on December 24, 2013. 78 Fed. Reg. 77796. The final rules amended the license requirements stated at 46 C.F.R. §11.465 for mates on towing vessels. 78 Fed. Reg. 77937 (Dec. 24, 2013). On-the-job training and sea service time were no longer sufficient to obtain a mate's license for ocean and near-coastal towing vessels. In addition to having at least 30 months total sea service, the revised regulation requires an applicant for a

requirements for licensure, the Coast Guard required additional training, including an increased emphasis on leadership and direction of non-licensed crewmembers. (App-442-443, ¶ 4.) In response to these changes by the Coast Guard, Brusco began to implement employment policies and practices, which incorporated the Coast Guard's emphasis on leadership and direction. (App-401, ¶ 5.) Brusco began requiring that its captains complete regular performance reviews for the mates and evaluate them on, among other factors, how well the mates lead their crewmembers. The captains also began to evaluate whether a mate is ready to be promoted to captain based on how well the mate leads and directs the crew. (*Id.*) This evidence was undoubtedly relevant to Brusco's claim, denied by the Board, that the mates "responsibly" direct crewmembers.

In addition, commencing in approximately 2010 and continuing into 2015, the distinction between Brusco's captains and mates became increasingly blurred because, by 2015, three quarters of employees classified by Brusco as mates held the same Coast Guard licenses as Brusco's captains. (App-441-442, ¶ 3.) Thus, under Coast Guard regulations, they were held to the same level of accountability as the captains for the performance of crewmembers under their command. (*Id.*)

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mate's license to undergo an apprenticeship of 12 months on a towing vessel as an apprentice mate. The applicant also must take a training course from a merchant marine service academy or training center approved under 46 C.F.R. §10.402, or undergo an examination by a Designated Examiner as specified in 46 C.F.R. §10.405.

On many voyages, there were two officers licensed as captains, although one was ordinarily classified by Brusco as a mate.[6] On other occasions, the two officers assigned to a tugboat were each normally classified by Brusco as mates, while one was designated to serve as captain for the particular voyage. (App-400, ¶ 3, ¶ 5.)

In placing blinders on itself regarding this evidence of an evolving legal and regulatory landscape defining the status and role of mates and a blurring between captains and mates, the Board first contends that the evidence cannot be considered because "newly discovered" evidence can be considered only if it concerns facts in existence at the time of the hearing in the representation case. (NLRB Brief, p. 58.) Under this grudging formulation of its rule, Brusco's evidence of evolving changes in the status and role of mates occasioned by changing Coast Guard requirements commencing in 2011 would, of course, be inadmissible because the last hearing in this case was conducted in 2001.

That leaves only the "special circumstances" prong of the Board's no-relitigation rule. *See Pace Univ. v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008) ("*Pace*") (relitigation in the unfair labor practice proceeding is allowed if newly discovered evidence or other "special circumstances" require a reexamination of

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[6] Due to the evolution of Brusco's business over the last 15 years, with downturns in the wood products industry causing fewer log and wood chip barges and a concomitant increase in construction and cargo operations, many of Brusco's customers now require that Brusco's tugboats be operated with two individuals holding captain's licenses. (App-443, ¶ 5.)

the decision in the representation proceeding).[7] Without describing the parameters of the vague and undefined "special circumstances" prong of its rule, the Board argues in its brief only that it "acted well within its discretion in determining that [Brusco] had not demonstrated such circumstances." (*Id*. at p. 58.) In support of that conclusion, the Board merely cites cases in which it previously held that "purported changes to bargaining unit employees' job duties—including those allegedly conferring supervisory status—do not constitute 'special circumstances'". (*Id*. at pp. 58-59.) However, the cited cases, for the most part, involved circumstances in which the employer unilaterally manufactured circumstances shortly after the conduct of a representation election in order to cloak certain employees with supervisory powers as a means to defend an ensuing refusal-to-bargain charge. *See*, *e.g.*, *Indeck Energy Servs. of Turners Falls, Inc.*, 318 NLRB 321, 321 & n.5 (1995) (four months after a representation election, the employer "conferred statutory supervisory authority on its shift supervisors" and then attempted to litigate the validity of the certification in defense of an unfair labor practice charge); *E. Michigan Care Corp.*, 246 NLRB 458, 459-60 (1979) (a few months after a representation election, the employer unilaterally changed job duties of bargaining unit employees so as to confer supervisory status).

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[7] In *Pace*, this Court recognized that "special circumstances" could include changes in "legal authority" or "new legal argument" that is "based on after-arising or after-discovered facts." *Pace*, 514 F.3d at 23-24.

In citing these cases, the Board ignores the fact that there is no evidence here that Brusco engaged in the stratagem of changing the work duties of its mates in order to nullify the results of the representation election conducted in this case. Rather, the "special circumstances" presented here involve regulatory changes implemented by the Coast Guard, and not Brusco, more than ten years after the conduct of the election. Brusco merely reacted to those incremental changes by placing additional emphasis, as the Coast Guard has, on the leadership and direction of crewmembers serving under the mates. The "special circumstances" presented by Brusco also involved a gradual blurring of the line between captains and mates over the last 16 years caused by the fact that the vast majority of Brusco's mates have obtained the same Coast Guard licensure as Brusco's captains, carrying an additional level of responsibility for the performance of the crewmembers serving under them. None of the cases cited by the Board involves such factual circumstances.

Accordingly, the reason espoused by the Board for concluding that Brusco has not demonstrated "special circumstances" lacks merit. The question remains: What are the proper parameters of the "special circumstances" prong of the Board's no-relitigation rule? A thorough review of the Board's case law reveals that the Board has found that "special circumstances" exist for purposes of its no-relitigation rule in only a handful of cases. Four of these cases involved

intervening legal changes that impacted the supervisory status of employees that had been previously included in the certified bargaining unit. *See Evangeline of Natchitoches, Inc.*, 323 NLRB 223 (1997) (the Supreme Court's intervening decision in *NLRB v. Health Care & Retirement Corp. of America*, 511 US 571 (1994), regarding the supervisory status of charge nurses, constituted "special circumstances" warranting the Board's reexamination of its prior representation decision in an unfair labor practice proceeding, although the Board adhered to its previous decision in the representation case that the nurses were not supervisors); *Parkview Manor,* 321 NLRB 477 (1996) (the same); *Brooklyn Psychosocial Rehabilitation Institute, Inc.*, 264 NLRB 114 (1982) (three intervening Board decisions called into question the Board's prior decision regarding the supervisory status of counselors/managers and constituted "special circumstances," justifying the Board's re-evaluation of the certification in the unfair labor practice case, although the Board again adhered to its previous decision that the individuals were not supervisors); *Allied Foods, Inc.,* 189 NLRB 513 (1971) (the Board found "special circumstances" sufficient to justify a reexamination of the certification when an intervening Board decision found that one of the employees alleged to have led the union organization effort was, in fact, a supervisor, but the Board again upheld its prior certification).

The only case we have located in which the Board did not simply adhere to

its prior decision in the previous representation case is *Brinks Inc. of Florida,* 276 NLRB 1 (1985). In that case, the employer claimed that the union's affiliation with a union that admitted to membership employees other than guards rendered improper the Board's certification of a bargaining unit of guards. Although the employer's request for review of the certification on this basis was denied by the Board, the Board nevertheless found that special circumstances existed, which entitled the employer to an evidentiary hearing regarding the affiliation issue in the unfair labor practice proceeding. *Id*. at 2.[8]

In light of the Board's extremely limited definition of "newly discovered" evidence and the fact that it has found "special circumstances" in only a handful of cases over the last 45 years, the Supreme Court's rule that employers are entitled to meaningful judicial review of a certification decision in an ensuing refusal-to-bargain case is undermined. *See, e.g.*, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 709 (2001) ("*Kentucky River*"); *American Federation of Labor v. NLRB*, 308 U.S. 401, 406-09 (1940). The Board's overly technical and restrictive decision in this case does the same, especially when considered in the

[8] In *Wackenhut Corp. v. NLRB*, 178 F.3d 543, 553, n. 10 (D.C. Cir. 1999), this Court stated that the *Brinks* decision "appears to be inconsistent with mainstream Board precedent" because the Board in *Brinks* held that "the mere re-raising of an issue in a technical refusal-to-bargain proceeding in which the employer claims that the union has violated section 9(b)(3) of the LMRA, [29 U.S.C. § 159(b)(3)] is a 'special circumstance' sufficient to warrant a new hearing."

context of the extremely long delays in the Board's processing of the representation proceeding.

Because of the Board's long delays in resolving the issue of the mates' supervisory status, it is fundamentally unfair to prohibit Brusco from presenting evidence regarding gradual changes in the legal and regulatory climate over the last several years.[9] These changes impact the status and role of mates, particularly in regards to their duties in leading and directing their crews and their responsibility for the conduct of crewmembers. The issue of responsibility is particularly important because the Board contends there is insufficient evidence that Brusco's mates "responsibly" direct crewmembers within the meaning of *Oakwood*. (NLRB Brief, pp. 43-48.) Brusco should be given the opportunity to present evidence that the Coast Guard's changing regulatory scheme and its effect on Brusco's operations establish that Brusco's mates are "responsible" within the

[9] While the Board attempts to explain away the delays in this case, its attempt is unavailing. (NLRB Brief, pp. 60-61.) Thus, there is no explanation for the four-and-a-half year delay between 2002, when Brusco requested review of the Regional Director's January 7, 2002 Supplemental Decision on Remand, and September 2006, when the Board merely remanded the matter back to the Regional Director. (App-342, 352.) Certainly, the Supreme Court's 2001 decision in *Kentucky River*, which was extensively discussed in the 2002 Supplemental Decision on Remand, cannot explain this four-year delay. (App-348.) Nor can the Board's 2006 decision in *Oakwood*, which was extensively discussed in the Board's Second Supplemental Decision on Remand dated December 21, 2006, explain the additional six-year delay until the Board issued its December 14, 2012 decision affirming that supplemental decision. (App-359-363, 367.)

meaning of *Oakwood*. The fact that most of Brusco's mates are now licensed as captains is also relevant to the issue of "responsible" direction, as it is uncontested in this case that Brusco's captains "responsibly" direct their crews.[10]

Affording Brusco an opportunity to present additional evidence is consistent with *Cogburn Health Center v. NLRB*, 437 F.3d 1266, 1272 (D.C. Cir. 2006), in which this Court held that the Board abused its discretion by failing to consider evidence of changed circumstances on the basis of untimeliness when "[t]he changed circumstances were gradual, incremental, and cumulative." While the Board labors mightily to distinguish *Cogburn*, its efforts are ultimately unsuccessful. (NLRB Brief, p. 56-57.) First, while the Board is correct that the Court in *Cogburn* does not specifically cite Board Rule 102.48(d)(2), 29 C.F.R. 102.48(d)(2), which refers to the need for a party to "promptly" present new evidence, the Court does refer to subsection (1) of that same rule, which references the offer of an explanation as to why evidence was "not presented previously." *Id*. at 1272. The Board in *Cogburn* refused to consider the newly proffered evidence "on the ground that it was untimely," and the Court's discussion centered on that

[10] General principles of maritime law are clearly relevant to the issue of whether a supervisor is "responsible" for directing employees under his or her watch. *Spentonbush/Red Star Companies v. NLRB*, 106 F.3d 484, 488-90 (2nd Cir. 1997). Here, in order to determine "responsible direction," the Board must interpret maritime law, an area outside the ambit of the Act to which the Board's interpretation is owed no deference. *See Commonwealth Communs., Inc. v. NLRB*, 312 F.3d 465, 468 (D.C. Cir. 2002).

very issue. *Id*. at 1272. Thus, while not specifically mentioned, Board Rule 102.48(d)(2), 29 C.F.R. 102.48(d)(2), was implicitly treated in the Court's opinion, which stated that the employer "acted reasonably under the circumstances" in presenting evidence of changed circumstances when it did and that the Board accordingly "abused its discretion in rejecting [the employer's] motion as untimely." *Id*.

Nor can *Cogburn* be effectively distinguished on the other grounds offered by the Board. As in *Cogburn*, the changed circumstances alleged by Brusco in this case were not encompassed in a "single event," but were rather "gradual, incremental, and cumulative" changes. *Id*. And, as aptly argued by the employer in *Cogburn*, "the longer the Board delayed in issuing its decision, the more changes occurred during the day to day operations" of the employer. *Id*.

The Board's additional attempt to distinguish *Cogburn* on the basis that the case reflects application of a special rule in cases where the Board has issued a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) ("*Gissel*"), also fails. (NLRB Brief, p. 56.) While cases applying *Gissel* may define to some degree what evidence of changed circumstances is relevant to the propriety of a bargaining order, these cases do not create a special rule regarding whether such evidence has been promptly submitted. On this latter issue, the holding in *Cogburn* establishes guidelines for determining the promptness of

providing evidence of changed circumstances that are "gradual, incremental, and cumulative" in all refusal-to-bargain cases, not just those involving *Gissel* bargaining orders.

The grant of summary judgment in this case relating to a refusal to bargain that allegedly took place in 2015 was decided on a deficient record because Brusco's evidence of changed or "special" circumstances that gradually took place since the last hearing in 2001 was rejected and not considered. Where the Board has failed to create an adequate record in a representation proceeding,[11] the Board's technical adherence to its rule against relitigation in a later unfair labor practice proceeding amounts to an abuse of discretion. Thus, in *Burns Electronic Sec. Services, Inc. v. NLRB,* 624 F.2d 403, 407-09 (2nd Cir. 1980), the Second Circuit ruled that, where the existing record in the representation proceeding was deficient, special circumstances existed to warrant permitting the employer to present evidence not provided during the representation hearing in an unfair labor practice hearing on a refusal-to-bargain charge.

The bottom line is that application of the Board's rule against relitigation of representation issues in the defense of a refusal-to-bargain case makes no sense

[11] *See* Board Rule § 102.64(b), 29 C.F.R. 102.64(b) (stating that it is the "duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties * * *.").

under the circumstances presented here because the purposes of the Board's rule have not been served. As this Court has stated, "[t]he purpose of the Board's non-relitigation rule is to 'estop relitigation in a related proceeding * * * in accordance with the long-held objective of avoiding undue and unnecessary delay in representation elections.'" *Pace*, 514 F.3d at 24, *quoting Amalgamated Clothing Workers v. NLRB*, 365 F.2d 898, 905 (D.C. Cir. 1966). "Judicial enforcement of the rule in turn 'protects the integrity of the administrative process by requiring a party to develop all arguments and present all available, relevant evidence at the representation proceeding,' rather than 'remain silent' and 'ultimately defeat unionization on * * * grounds asserted for the first time in the ensuing unfair labor practice proceeding.'" *Pace*, 514 F.3d at 24, *quoting St. Anthony Hosp. Sys. v. NLRB*, 655 F.2d 1028, 1030 (10th Cir. 1981). *See also Burns*, 624 F.2d at 409 ("The purpose of the rule, as stated by the Board in its brief, is to prevent an employer from deliberately withholding evidence at the representation hearing and then seeking to use it in the subsequent unfair labor practice hearing.")

The purpose of the rule is simply not present here because any delays in the processing of the representation case were caused by the Board and not by Brusco. And, in addition, Brusco did not hold back on presenting the evidence that it now seeks to present during the hearings in 1999 or 2001 because the evidence did not yet exist. *See Pace*, 514 F.3d at 24 (the Board's no-relitigation rule "requires

litigation of any unit issues that a party has reason, ability, and opportunity to contest during the representation proceeding"). In 2001, when this case last went to hearing, Coast Guard regulations required less training for a deckhand to be elevated to the licensed status of a mate and there was less emphasis placed on the mates' leadership and direction of crews. However, in the many years that this case has been pending due to the Board's delay, there have been changes in the Coast Guard's regulatory framework, to which Brusco, by necessity, has been compelled to adapt. In addition, Brusco's mates have gradually achieved the same licensure as captains, and the distinction between mates and captains has gradually blurred. The Board, and the Union, close their eyes to these changes and attempt to "sweep them under the rug," in reliance on a stale record in an administrative hearing held in 2001, before the changes were made.

Fundamental fairness dictates that Brusco be permitted to present evidence regarding the current state of affairs either at a reopened representation hearing or during an unfair labor practice hearing in defense of the refusal-to-bargain charge. Such a course will insure that the currently constituted bargaining unit does not contain statutory supervisors and, if so, that the desires of the remaining employees to be represented, or not to be represented, by the Union will be respected. The Board's refusal to consider the evidence of special circumstances offered by Brusco constitutes an abuse of discretion.

IV. CONCLUSION

For the reasons set forth in Brusco's opening brief and in this reply brief, the Court should grant Brusco's petition for review and deny the Board's cross-application for enforcement. The Court should reverse the summary judgment against Brusco and remand for an unfair labor practice hearing at which Brusco will be permitted to submit additional evidence relating to the appropriateness of the bargaining unit in defense of the refusal-to-bargain charge. In the alternative, the Court should hold the unfair labor practice case in abeyance while vacating its decision in the representation proceeding and permitting Brusco to submit its evidence as to the appropriateness of the bargaining unit in that proceeding.

Dated this 2nd day of September, 2016.

Respectfully submitted,

/s/ Michael T. Garone
Thomas M. Triplett
Michael T. Garone
Schwabe, Williamson & Wyatt
1211 S.W. Fifth Avenue, Suite 1900
Portland, OR 97204
ttriplett@schwabe.com
mgarone@schwabe.com
Telephone: (503) 222-9981
Attorneys for Petitioner/Cross-Respondent
Brusco Tug & Barge, Inc.

CERTIFICATE OF COMPLIANCE

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,433 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

2. This reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: September 2, 2016.

/s/ Michael T. Garone
Thomas M. Triplett
Michael T. Garone

Attorneys for Petitioner/Cross-Respondent
Brusco Tug & Barge, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **REPLY BRIEF OF PETITIONER BRUSCO TUG & BARGE, INC.** was served by the Appellate ECF System, if applicable, and by United States first-class mail, postage prepaid, on the 2nd of September, 2016, on the following parties:

James B. Coppess 815 Sixteenth Street, N.W. Washington, DC 20006 Attorney for Intervenor International Organization of Masters, Mates & Pilots, ILA, AFL-CIO	Gabriel A. Terrasa Terrasa & Stair PA 7472 Weather Worn Way Columbia, MD 21046-1461 Attorney for Intervenor International Organization of Masters, Mates & Pilots, ILA, AFL-CIO
Linda Dreeben Julie Broido Michael R. Hickson National Labor Relations Board 1099 14th Street, N.W., Room 11602 Washington, DC 20570-0001 Attorneys for National Labor Relations Board	

By: /s/ Michael T. Garone
Thomas M. Triplett
Michael T. Garone

Attorneys for Petitioner/Cross-Respondent
Brusco Tug & Barge, Inc.
Michael T. Garone